Supreme Court of the United States.

OCTOBER TERM, 1944.

No. 1256

BOSTON AND MAINE RAILROAD,
Petitioner,

v.

EDWARD L. CABANA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

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To the Honorable Supreme Court of the United States:

The petitioner, Boston and Maine Railroad, a corporation duly organized under the laws of the Commonwealth of Massachusetts, hereinafter referred to as the defendant, respectfully prays that a writ of certiorari be issued requiring to be certified to this Honorable Court for review and determination a cause in which it is the defendant-appellant, and in which the respondent, Edward L. Cabana of the Commonwealth of Massachusetts, hereinafter referred to as the plaintiff, is the plaintiff-appellee.

1. Statement of the Matter Involved.

The action, which is one of tort for personal injuries, was brought under the Employers' Liability Act by writ dated March 15, 1944, in the District Court of the United States for the District of Massachusetts (R. p. 1).

The complaint (filed March 15, 1944) (R. pp. 1-4) is in two counts. The first count alleges, in substance, that the action is brought under the Employers' Liability Act; that the defendant railroad is engaged in interstate commerce, and on August 17, 1943, for the purpose of carrying on said commerce, maintained a roundhouse known as the New Terminal Engine House at Boston, where, among other work done, locomotives engaged in interstate commerce were actually repaired in connection with and for the purpose of such interstate commerce; that it was the duty of the defendant to furnish a reasonably safe place for its employees, including the plaintiff, in which to do their work, but in violation of said duty the defendant maintained said premises in an unsafe and dangerous condition in that the defendant for a long time prior to August 17, 1943, negligently suffered and permitted said premises to be dark and insufficiently lighted, subjecting said employees, including the plaintiff, to the risk and danger of injury from said condition, and the defendant for several years negligently failed to furnish and maintain the necessary artificial illumination to protect its employees, including the plaintiff, from injury arising from the darkness which existed in said engine house; that the defendant well knew of said unsafe and dangerous condition and on many and divers occasions was warned of the existence of said condition and the consequent danger thereof, but, notwithstanding said warnings of the condition and the danger to its employees, which condition the defendant well knew as aforesaid, the defendant neglected to provide and maintain sufficient artificial lighting facilities to safeguard its employees, including the plaintiff, from injury or death by accident which might reasonably be foreseen would result from such a condition; that the plaintiff was employed by the defendant in interstate commerce and on August 17, 1943, was working on the repair of a locomotive

owned by said defendant in said engine house, as a helper to another machinist of the defendant, and in the course of said repair and while plaintiff and his fellow employee were so engaged both feet of the said plaintiff were run into and over by the wheels of another locomotive which was then and there being backed by another employee of the defendant railroad onto the track within and around which the plaintiff was working; that such injury arose out of the failure of the operator of the locomotive to observe the plaintiff, which failure was caused in whole or in part by the darkness which existed in said engine house, due to the negligence of the defendant railroad as aforesaid, in consequence of which the plaintiff herein has been permanently incapacitated, has been unable to do any work or in any way earn his living, and has incurred large bills for medical treatment and for nursing and care which it was necessary to have by reason of said injuries.

The second count alleges in substance that on August 17, 1943, at the time and place and in the manner stated in the foregoing count of the complaint, while in the employ of the defendant and working with a fellow employee in the repair of a locomotive owned by the defendant, suddenly and without warning, his two feet were run into and over by the wheels of a locomotive owned by the defendant railroad which was then and there backed onto the track within and around which plaintiff was working; that such injuries resulted in whole or in part from the negligence of said servant or agent of the defendant, who operated and backed said locomotive in a careless, unskillful and negligent manner, whereby the plaintiff suffered the injuries complained of, in consequence of which plaintiff has become permanently incapacitated and unable to earn his living and has incurred large medical bills for doctors, medicines and hospitalization, all of which arose in whole or in part through the negligence of the defendant by and through its servant or agent as aforesaid.

The defendant's answer (R. pp. 4-5) (filed March 30, 1944) to the first count admits that the defendant was engaged in interstate commerce; that it was its duty to provide a reasonably safe place for its employees, including the plaintiff, in which to do their work; and that the plaintiff was employed by the defendant on August 17, 1943; but denies that the plaintiff was engaged in interstate commerce, and denies all the other allegations of the first count.

The defendant's answer to the second count (R. p. 5) admits that the plaintiff was in the employ of the defendant on or about August 17, 1943, but denies all the other allegations of the second count except such as are expressly admitted under the first count.

Further answering both counts, the defendant denies that the plaintiff was injured through any negligence on the part of the defendant; and alleges in substance that the plaintiff's own negligence was the sole proximate cause of his injuries; and that the plaintiff's own negligence contributed in whole or in part to his injuries.

The case was tried before Wyzanski, J., and a jury on October 24, 25, and 26, 1944, in the District Court of the United States for the District of Massachusetts (R. p. 5). The jury returned a verdict for the plaintiff on the first count in the sum of nine thousand (9000) dollars, and on the second count returned a verdict for the defendant, and thereafter, on October 27, 1944, upon the verdict and stipulation of the parties that the amount of the verdict should be reduced by nine hundred (900) dollars, judgment was entered for the plaintiff on the first count in the sum of eight thousand one hundred (8100) dollars, and for his costs, and judgment for the defendant with its costs on the second count (R. pp. 8-9).

From the judgment for the plaintiff on the first count the defendant appealed to the Circuit Court of Appeals

for the First Circuit, and notice of appeal was filed by the defendant November 2, 1944 (R. p. 199).

On March 23, 1945, the Circuit Court of Appeals for the First Circuit affirmed the judgment of the District Court. In the opinion (R. pp. 205-212) the court said (R. p. 211):

> "As we view the case, however, it is not necessary to decide the question raised by the appellant whether or not it was physically possible for the hostler to see around or over the tender and to decide if the jury could reasonably infer that had there been adequate lighting, the hostler would have been able to see the plaintiff in time to avoid the accident. Whether or not he was in a position to see the plaintiff, the evidence clearly warrants a finding that if there had been adequate lighting the plaintiff would have been able to see the backing engine in time to get out of the way."

2. Jurisdiction.

Jurisdiction to review this cause exists under Judicial Code, sec. 240 (a), as amended by Act of February 13, 1925, c. 229, § 1; 43 Stat. 938; U.S.C. Tit. 28, c. 9, § 347.

The date of entry of the judgment in the cause sought to be reviewed was March 23, 1945 (R. p. 212). The judgment was rendered by the Circuit Court of Appeals for the First Circuit.

3. Questions Presented.

The questions presented for the consideration of the Supreme Court of the United States are as follows:

I. Was the defendant guilty of any breach of duty to the plaintiff in regard to lighting at the time and place where the plaintiff was injured?

II. Was the alleged insufficiency of the lighting at the time and place where the plaintiff was injured the proximate cause of his injuries?

III. Was the Circuit Court of Appeals in error in deciding the case upon a ground not raised by the pleadings and not within the theory of the case as tried?

4. Reasons Relied on for Allowance of Writ.

The decision rendered in this cause on March 23, 1945, by the Circuit Court of Appeals for the First Circuit (*Boston and Maine Railroad* v. *Edward L. Cabana*, R. pp. 205-212) is in conflict with the decisions of this Honorable Court and with the decisions of other courts of last resort, because—

1. The Circuit Court of Appeals erroneously held that the evidence was sufficient to warrant a finding that the defendant was guilty of a breach of duty to the plaintiff in regard to the condition of the lighting at the place where the plaintiff was injured.

2. The Circuit Court of Appeals erroneously held that the evidence was sufficient to warrant a finding that failure to keep the premises properly lighted was the proximate cause of the plaintiff's injuries.

3. The Circuit Court of Appeals erroneously decided the case upon a ground not raised by the pleadings and not within the theory of the case as it was tried.

BOSTON AND MAINE RAILROAD, Petitioner,
By its Attorney,
Francis P. Garland.

Of Counsel:
Hurlburt, Jones, Hall & Bickford.